LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 1 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 230

In the Matter
of
BEEHLER ARTS, LTD.,
Bankrupt,
LEVIN & WEINTRAUB,
Petitioners,
—v.—
ALFRED A. ROSENBERG, TRUSTEE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BENJAMIN WEINTRAUB
LEVIN & WEINTRAUB
Attorneys pro se
2 Lafayette Street
New York 7, New York

BENJAMIN WEINTRAUB
HERMAN A. BURSKY
Of Counsel

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement	4
Reasons for Granting the Writ	5
Conclusion	14
Appendix	1a

Citations

Cases:

Bournias v. Atlantic Maritime Co., 220 F. 2d 152 (2d Cir. 1955)	7-8
Clauser v. Harrisburg National Bank & Trust Co., 219 F. Supp. 38 (M. D. Pa. 1963)	10
Herget v. Central National Bank & Trust Co., 324 U. S. 4, 65 S. Ct. 505 (1945)	10, 11, 13
Holmberg v. Ambrecht, 327 U. S. 392, 66 S. Ct. 582 (1946)	12
Littman, Matter of (an unreported decision of Referee Stephenson, No. 89,196, S. D. N. Y. 1953)	6

PAGE

McBride v. Farrington, 60 F. Supp. 92 (D. Ore 1945), aff'd 156 F. 2d 971 (9th Cir. 1946) 12

Valor Handbags, Inc., Matter of (an unreported decision No. 88,450, S. D. N. Y. 1952) 6

Statutes:

Bankrupty Act
Section 60d, 11 U. S. C. §96d 2, 4, 5, 6, 8, 9, 11, 12, 13
Section 11e, 11 U. S. C. §29e 3, 4, 5, 7, 8, 10, 11, 12, 13
Section 70a, 11 U. S. C. §110a 3, 7, 9, 10

Miscellaneous:

U. S. Code, Congressional and Administrative News, May 8, 1963, page 678 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. .....

In the Matter

of

BEEHLER ARTS, LTD., *Bankrupt,*

LEVIN & WEINTRAUB, *Petitioners,*

—v.—

ALFRED A. ROSENBERG, TRUSTEE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled cause on April 6th, 1964. The judgment of the United States Court of Appeals for the Second Circuit affirmed an order of the United States District Court for the Eastern District of New York, which order denied a petition for review of an order made by the Referee in Bankruptcy.

Opinions Below

The opinion of the Court of Appeals (App. *infra* pp. 3a-5a) is officially reported in 330 F. 2d 98 (2nd Cir. 1964). The opinion of the District Court (App. *infra* pp. 6a-9a) is unreported. The Referee's decision and order (App. *infra* pp. 10a-14a) is unreported.

Jurisdiction

The judgment of the Court of Appeals was made and entered on April 6, 1964 (App. *infra* pp. 1a-2a). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Question Presented

The question presented for determination is whether the Bankruptcy Court can institute proceedings under Section 60d of the Bankruptcy Act, 11 U. S. C. §96d, on its own initiative after the expiration of the two year period made applicable by Section 11e of the Bankruptcy Act, 11 U. S. C. §29e.

Statutes Involved

11 U. S. C. Section 96d, B. A. §60d:

> If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney at law, for services rendered or to be rendered, the transaction may be examined by the court on its own motion or shall be examined by the court on petition of the trustee or any creditor and shall be held valid only to the extent of a reasonable amount to be determined by the

court, and the excess may be recovered by the trustee for the benefit of the estate.

If, whether before or after filing, a debtor shall agree orally or in writing to pay money or transfer property to an attorney at law after the filing, the transaction may be examined by the court on its own motion or shall be examined by the court on petition of the bankrupt made prior to discharge and shall be held valid only to the extent of a reasonable amount to be determined by the court, and any excess obligation shall be canceled, or if excess payment or transfer has been made, returned to the bankrupt.

11 U. S. C. Section 29e, B. A. §11e:

A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. * * *

11 U. S. C. Section 110a, B. A. §70a:

The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title, * * *

* * * * *

Statement of Facts

On January 20, 1961, Beehler Arts, Ltd. filed a petition for an arrangement pursuant to Chapter XI of the Bankruptcy Act. The debtor was thereafter adjudicated a bankrupt.

On August 23, 1963, Referee William J. Rudin served a notice of hearing that he would examine into the fees paid to the attorneys for the debtor pursuant to Section 60d of the Bankruptcy Act, 11 U. S. C. §96d (Record page 2a). Thereafter, on August 29, 1963, the attorneys for the Trustee served notice of motion for a reexamination into the fees paid to the attorneys for the debtor pursuant to Section 60d of the Bankruptcy Act (Record page 3a).

On August 30, 1963, an answer was interposed by Levin & Weintraub, the petitioners herein, to the above notices, which answer contained a general denial and two affirmative defenses (Record pages 5a-9a); the first, that the proceedings were barred, since they were instituted more than two years after the filing of the petition under Chapter XI of the Bankruptcy Act, and the second that the fee received was fair and reasonable.

A hearing was held pursuant to said notices before Referee Rudin, on September 3, 1963 (Record pages 10a-12a). The Referee concluded that the trustee was barred by the two year Statute of Limitations (Section 11e of the Bankruptcy Act, 11 U. S. C. §29e), but that the Court was not and, therefore, he had the right to reexamine the reasonableness of the fees. The Referee fixed the fee at $750.00 and allowed $50.00 for disbursements, and directed that the sum of $1,860.00 be turned over to the trustee (Record pages 13a-16a).

On September 12, 1963, petitioners petitioned for the review of the Referee's order (Record pages 17a-18a). By its opinion dated October 30, 1963, the District Court affirmed the Referee's determination (Record pages 19a-22a). On April 6, 1964, the United States Court of Appeals for the Second Circuit entered judgment affirming the decision of the District Court (Record page 30a). This appeal is from said judgment of the Circuit Court.

Reasons for Granting the Writ

The opinion of the United States Court of Appeals for the Second Circuit decided an important question of Federal Bankruptcy law, which the petitioners respectfully submit should be settled by this Court. Aside from this being a case of first impression, the question presented is of importance in the administration of the Federal Bankruptcy law.

Institution of any proceedings under Section 60d of the Bankruptcy Act were barred by the applicable Statute of Limitations.

Prior to the institution of these proceedings, two years had elapsed since the bankrupt herein was adjudicated. Therefore, any proceeding to examine fees paid to attorneys under Section 60d of the Bankruptcy Act, 11 U. S. C. §96d was barred by Section 11e of the Bankruptcy Act, 11 U. S. C. §29e. Indeed the courts below correctly held that any motion brought by the trustee was barred due to the applicable Statute of Limitations, but they also found the Referee was not barred for the reasons hereinafter discussed.

Their reasoning as to the trustee's action is sustained by several cases cited by the Referee:

In the *Matter of Littman* (an unreported decision of Referee Stephenson, Docket No. 89,196, S. D. N. Y. 1953), the trustee instituted a proceeding under Section 60d of the Bankruptcy Act, 11 U. S. C. §96d, to reexamine fees paid to attorneys. The Referee held:

> "Under Section 11(e) of the Bankruptcy Act this proceeding is barred (Herget v. Central National Bank & Trust Co. of Peoria, 324 U. S. 4). The Herget case was an action to recover a preference. The right to sue for a preference is created by the Bankruptcy Act, just as the right to recover under §60-D is a right created by the Bankruptcy Act, and the statute of limitations applies to both proceedings. Therefore, this defense is sustained and the petition denied."

This issue also arose in the *Matter of Valor Handbags, Inc.* (an unreported decision Docket No. 88,450, S. D. N. Y. 1952), wherein the Referee held that no proceedings under Section 60d, 11 U. S. C. §96d could be instituted after the expiration of two years from the date of the adjudication.

In the instant case the courts below failed to apply the governing Statute of Limitations to the Court's motion, and thereby held that Section 60d of the Bankruptcy Act, 11 U. S. C. §96d gives the Court the right to examine fees paid by a debtor to his attorney at any time. This controversy is a problem of first instance arising under the recently amended Section 60d of the Bankruptcy Act, 11 U. S. C. §96d. On May 8, 1963 the section was amended to allow the court to reexamine fees paid to attorneys (Public Law 88-17). The statute presently reads:

> "If a debtor shall, directly or indirectly in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney at law, for services rendered or to be rendered, the transac-

tion may be examined by the court *on its own motion* or shall be examined by the court on petition of the trustee or any creditor and shall be held valid only to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate." (Italics ours.)

However, the errors the courts below committed were in failing to recognize that the Referee's right is derivative, as title to all the assets, claims and actions of the estate are vested in the trustee by virtue of the Bankruptcy Act, Section 70a, 11 U. S. C. §110a. Any action, therefore, initiated by the Referee is on behalf of the estate and in the name of the Trustee, and when the applicable Statute of Limitations bars the Trustee, it must likewise bar the Referee. Thus the Referee has no standing to sue or to institute proceedings in his own name. Moreover, when Congress enacted Section 11e of the Bankruptcy Act, 11 U. S. C. §29e it enacted a Statute of Limitations for the purpose of setting a cut-off date after which no claims could be instituted by the Trustee or against the Trustee or on behalf of the Trustee.

It should, therefore, follow that Section 11e of the Bankruptcy Act, 11 U. S. C. §29e is the applicable Statute of Limitations to a motion by the Referee under Section 60d. The result which necessarily follows from the holdings below is that Section 11e of the Bankruptcy Act, 11 U. S. C. §29e is not applicable to the court (referee), and that no other time limitation being found applicable the court can reexamine the fees without any time limitation being imposed on this right.

In this connection it is well to consider the basic concept of statute of limitations. Such statutes are generally considered matters of procedural law. In *Bournias* v.

Atlantic Maritime Co., 220 F. 2d 152 (2d Cir. 1955), Mr. Justice Harlan, while a circuit judge, stated at page 154:

> "The general rule appears established that for the purpose of deciding whether to apply local law or foreign law statutes of limitations are classified as 'procedural.'"

No exception to the general rule being applicable to the issues presented by this appeal, it is submitted to this court that the applicable statute of limitations is Section 11e of the Bankruptcy Act, 11 U. S. C. §29e and that the statute of limitations is procedural as involved in the questions herein presented.

Section 11e of the Bankruptcy Act, 11 U. S. C. §29e is the statute of limitations which Congress enacted to govern actions and proceedings resulting from claims by or in behalf of the Trustee. Section 60d, 11 U. S. C. §96d is the substantive section involved in this litigation. Section 60d having no "built-in" or substantive statute of limitations of its own, it is submitted to this court that the opinions below erred in not finding that the referee was bound by Section 11e, 11 U. S. C. §29e.

All other actions under Section 60 of the Bankruptcy Act are governed by the two year statute of limitations resulting from the enactment of Section 11e. The opinions below indicate that an exception to Section 11e resulted from the 1963 amendment to the Bankruptcy Act. There is no precedent for such exceptions, and any such exception would defeat the purpose of Section 11e.

The proceedings before Congress indicate that, although the Trustee and creditors previously had the authority to examine the reasonableness of the fees paid to attorneys, Congress felt that they were reluctant to challenge the fair-

ness of these fees. Therefore, in view of the wording of Section 60d as it existed, the section was amended to grant the court the authority on its own initiative to examine fees paid to attorneys. "The bill strengthens the power of the court to review the reasonableness of attorneys' fees in bankruptcy cases." U. S. Code, Congressional and Administrative News, May 8, 1963, page 678.

It is submitted that the enactment of this amendment was to strengthen the power of the court and not to lengthen or enlarge the time within which this power could be exercised. The Referee can institute the proceeding at any time within the two year period and therefore would in no way be hampered by a holding that his motion is governed by the two year limitations. The two year period resulting from Section 11e would be adequate, and therefore the Circuit Court erred in holding that when Congress amended Section 60d of the Bankruptcy Act to strengthen the right of the court, it gave the court the right to reexamine fees at any time without limitation.

Section 60d provides in part that "the excess may be recovered by *the trustee* for the benefit of the estate." (Emphasis added.) This phrase refers to any proceeding instituted under Section 60d whether it be on the court's own motion or on the petition of any creditor or the trustee. Obviously this is in conformity with Section 70a which provides that the trustee is vested by operation of law with the title of the bankrupt and only the trustee and not the referee can recover any excess payments. Section 60d merely allows the referee on his own motion to examine into the question of fees paid to the debtor's attorney. If the referee so examines and finds that there is an excess he then can direct the trustee to recover said excess. However, since the trustee was barred by the statute of limitations and all rights vested in him, he could so act if

directed by the referee, but the statute of limitations would be a complete defense.

Any action by the referee is accomplishing indirectly what could not be accomplished directly through the trustee. Such action is not in harmony with Section 60d which states that the excess may be recovered by the trustee, and is further not in harmony with Section 70a which provides that title to all the bankrupt's property vests in the trustee.

Petitioner's argument is consistent with the salutary purposes of the recent amendment, i.e., that petitioner concedes the necessity for an independent review of the fees, but such independent review must be made within the two year period.

Several other cases reinforce this position. *Clauser* v. *Harrisburg National Bank & Trust Co.*, 219 F. Supp. 38 (M. D. Pa. 1963), is a recent case dealing with Section 11e of the Bankruptcy Act. The court, quoting from 1 Collier on Bankruptcy, p. 1196, stated at page 40:

> "Subdivision e operates as a statute of limitations on suits brought in behalf of the estate by the receiver or trustee. The language of the subdivision clearly indicates that it has reference to suits initiated subsequent to the time of bankruptcy. If the cause of action arises under the Bankruptcy Act itself, the two year period is the maximum time which is allowed."

This recent decision is in accord with the decisions of this court. See *Herget* v. *Central National Bank & Trust Co.*, 324 U. S. 4, 65 S. Ct. 505 (1945), wherein it was stated that:

> "Two-year limitations on suits by and against trustees have long been integral parts of federal bankruptcy

statutes. Section 8 of the Bankruptcy Act of 1841, 5 Stat. 440, 446, 447, applied a two year limitation on any 'suit at law or in equity' by or against any assignee of the bankrupt."

The holdings of the courts below are not in accord with Section 11e, and the two year period therein, as being the applicable statute of limitations for all cases arising under the Bankruptcy Act. These holdings are establishing a precedent without citing authority, and which precedent would be contra to the reasoning of having all actions governed by some time limitation. The right given to the court on its own motion to examine fees paid to attorneys for the debtor should be governed by some time limitation. This right is derivative in nature in that all claims of the estate are in the name of the Trustee, and as this Court has stated in the *Herget* case, *supra*, the two year limitation has long been an integral part of the Bankruptcy Act.

It could be argued that if Congress intended that Section 11e of the Bankruptcy Act should be applicable to the court, it would have so enacted. It has consistently been stated that the Bankruptcy Act should be and is governed by the principles of equity jurisprudence. In all Federal equity cases where no statute of limitations is specifically applicable, the rule of laches governs the situation. This rule evolved from the necessity of having some limitation on all actions, even when no limitation is specifically applicable. In order to determine if the rule of laches should be invoked or not, the court usually turns to the statute of limitations which would control the situation in a state court or to an analogous Federal statute. If such is the case in this instance, the court should turn to Section 11e of the Bankruptcy Act which governs other situations under the Act and which governs all other proceedings under Section 60d, and find that since the two year period expired prior to the institution of these proceedings and

prior to the amendment to Section 60d that the rule of laches should be invoked herein.

To hold that the Referee was barred from reexamining the fees in this situation would be in conformity with the normal equitable rule of laches and also with the applicable statute of limitations for all other 60d proceedings. It would prevent the allowance of a right without a time limitation within which it can be exercised.

In the case of *Holmberg* v. *Ambrecht*, 327 U. S. 392, 66 S. Ct. 582 (1946), this court stated at page 394 that a "statute of limitations is a significant part of the legal rules which determine the outcome of a litigation." The opinions below completely ignored the importance of a statute of limitations and evolved a rule whereby the Court or Referee could act at any time. The Courts below failed to realize that the Court (Referee) must act for and in behalf of the trustee. The amendment to Section 60d of the Bankruptcy Act was to prevent certain abuses, and was recommended by the Administrative Office of the U. S. Courts. These abuses can be prevented by the Referee within the two year period, and there is no need to completely disregard Section 11c of the Bankruptcy Act and to have a right without a limitation.

In *McBride* v. *Farrington*, 60 F. Supp. 92, 96 (D. Ore. 1945), *aff'd* 156 F. 2d 971 (9th Cir. 1946), it was stated that "Entirely irrespective of limitations, state or federal, in a court of bankruptcy which is controlled by equitable principles, it would seem that the doctrine of laches was applicable." It is submitted that a holding which would require the Referee to proceed promptly within the two year period would place no hardship on him and would allow a certain measure of protection to those who might be subject to legal proceedings arising out of some phase of the administration of a bankrupt estate.

Section 11e bars the trustee from instituting any proceedings after the expiration of the applicable two year period. In fact, prior to the amendment granting the referee the power to reexamine attorneys' fees, this matter was barred to the trustee. The bankrupt was adjudicated on January 20, 1961, and therefore the two year period expired on January 20, 1963. Section 60d of the Bankruptcy Act was amended on May 8, 1963. "If Congress expressly puts a limit upon the time of enforcing a right which it created, there is an end of the matter. The Congressional statute of limitations is definitive." *Herget* v. *Central National Bank & Trust Co., supra.*

The referee's power to initiate proceedings being in the name of the estate and/or the trustee, and such power being derivative, this court should find that the Referee was barred either under Section 11e of the Bankruptcy Act or because of the rule of laches. The statute of limitations affords protection to those against whom proceedings might be instituted. In upholding the decision below this court would be establishing a precedent, in a case of first impression, whereby a referee would have the power and authority to reexamine expenditures and fees under Section 60d for an unlimited period of time. If the administration of an estate would be pending for an extremely long period of time, the decisions below would give a referee the power at that late date to reexamine fees paid and therefore would place an obligation on the parties so challenged to produce books, records and other papers relating to the challenged point years after they were involved in the matter. Such a result would be contrary to the reasoning behind the enactment of Section 11e of the Bankruptcy Act, and contrary to the theory of statute of limitations generally.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

LEVIN & WEINTRAUB

BENJAMIN WEINTRAUB
HERMAN A. BURSKY
Of Counsel

APPENDIX

Order and Judgment of the Circuit Court

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of April, one thousand nine hundred and sixty-four.

Present:

HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. THURGOOD MARSHALL,

Circuit Judges.

In the Matter

of

BEEHLER ARTS LTD.,

Bankrupt.

LEVIN & WEINTRAUB,

Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

Order and Judgment of the Circuit Court

On Consideration Whereof, it is now being ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk

Opinion of the Circuit Court

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 341—September Term, 1963.

(Argued March 11, 1964 Decided April 6, 1964.)

Docket No. 28641

LEVIN & WEINTRAUB,

Appellants,

—v.—

ALFRED A. ROSENBERG, Trustee,

Appellee.

In the Matter of BEEHLER ARTS, LTD.,

Bankrupt.

Before:

SMITH, KAUFMAN and MARSHALL,

Circuit Judges.

Appeal from order upholding referee's determination reducing attorney's fees in proceeding in bankruptcy in the United States District Court for the Eastern District of New York, Leo F. Rayfiel, *District Judge*. Affirmed.

BENJAMIN WEINTRAUB, New York, N. Y. (Levin & Weintraub and Herman A. Bursky, New York, N. Y., on the brief), *attorneys pro se.*

Opinion of the Circuit Court

SMITH, *Circuit Judge*:

This is an appeal from an order of the United States District Court for the Eastern District of New York, Rayfiel, *J.*, upholding the bankruptcy referee's determination that the attorney fees paid by the debtor to the appellant were excessive. The $2550 fee was reduced to $750, primarily because the size of the estate had shrunk considerably in administration. We find the reduction justified and affirm the order.

The petition was filed more than two years before the trustee moved to examine the fees paid to the appellant. The referee determined that the trustee was barred by the two year limitation period imposed via §11(e) of the Bankruptcy Act, 11 U. S. C. §29(e) on causes of action derived from the Bankruptcy Act. See *Herget* v. *Central Nat. Bank & Trust Co.*, 324 U. S. 4, 65 S. Ct. 505 (1945). However, the referee held that the 1963 amendment to §60(d) of the Bankruptcy Act, 11 U. S. C. §96(d), which authorized the court, on its own motion, to reexamine counsel fees paid by a debtor, was not subject to any limitations period imposed by §11(e).

This is a question of first impression, depending on the interpretation of the 1963 amendment to §60(d). The Senate Report on the amendment states that its purpose is "to strengthen the provisions of the Bankruptcy Act governing the review of attorneys' fees by the bankruptcy court." Congress apparently felt that "lawyers are frequently reluctant to challenge the fairness of the fees charged by their colleagues" and the referees have been hesitant to examine the fees on their own. U. S. CODE CONG. & ADMIN. NEWS 637-638 (1963).

Nothing is said in the amendment or in the legislative history as to whether the limitations period of §11(e) is to

apply to the court's power to reexamine the fees. Appellant contends that the right even though enforced by the court is really derivative from the trustee's rights regarding counsel fees and should be subject to the same limitations. We think, however, that the course taken, of making review a matter for the court in the bankruptcy proceeding, is not wholly consistent with an intent to cut off the court's power of review while the proceeding is still pending before it, that such a limitation if intended would have been expressed, and that the Congressional purpose of strengthening the Act in this regard is best carried out by preserving the court's power free from the limitations of §11(c).

Time spent and appellants' standing in the field are relevant factors in considering the amount of the fee. However, the size of the estate and the amount available are also relevant factors. *Rosenberg* v. *United States*, 242 F. 2d 141 (2 Cir. 1957). In this case the balance available is some $4200 out of gross assets of $19,000, against which are claims for allowances of some $5500, and priority claims of over $50,000, obviously leaving nothing for general creditors. The reduction of appellant's fee from $2550 plus $50 disbursements to $750 plus $50 disbursements appears to us reasonable.

The order of the District Court is affirmed.

Opinion of the District Judge

[SAME TITLE]

Appearances:

LEVIN & WEINTRAUB, Esqs.

by BENJAMIN WEINTRAUB, Esq.
Of Counsel
For the Petitioner

RAYFIEL, J.

This is a petition to review an order of Hon. William J. Rudin, Referee in Bankruptcy, dated September 10, 1963, in which he fixed the reasonable value of the services rendered by the attorneys for the debtor at $750.00, plus $50.00 for disbursements, and directed them to turn over to the trustee the sum of $1,800.00.

The bankrupt filed a petition for arrangement pursuant to Chapter XI of the Bankruptcy Act, and paid the petitioners herein, its attorneys, the sum of $2,600 to cover their fees and disbursements in the proceeding. They performed the services set forth in their answer but by reason of their inability to effectuate a plan of arrangement the debtor was adjudicated a bankrupt. All of its assets were liquidated and there is now $12,705.39 in the estate.

The trustee made an application under Section 60(d) of the Bankruptcy Act, (Section 96(d) of Title 11, U. S. C.) returnable before the Referee on September 3, 1963, for an examination of the fees paid to the attorneys for the debtor. The Referee served notice upon the attorneys for the debtor and the trustee that at the same time he, too,

would, pursuant to said Section 60(d), examine said fees.

The attorneys for the debtor interposed an answer containing a general denial and two affirmative defenses; the first, that the proceeding was barred since it had been instituted more than two years after the filing of the Petition under Chapter XI, and second, that the fee which they had received was fair and reasonable.

The Referee held that the *trustee* was barred by the two year statute of limitations applicable thereto [Section 11(e) of the Bankruptcy Act, (Section 29(e) of Title 11, U. S. C.)] but that the *Court* was not, and that therefore he had the right to examine it. He then fixed their fee at $750.00, allowed their disbursements in the sum of $50.00, and directed them to turn over the remainder of $1,800 to the trustee.

The attorneys for the debtor contend that the Referee erred in his findings, (1) that his examination of their fees was not barred by the two year statute of limitations, and (2) that their fees were not reasonable.

Until May of this year Section 60(d) (96(d) supra) provided that the Court "*on the petition of the trustee or any creditor*" (emphasis mine) could reexamine the fee paid to an attorney by a debtor in contemplation of the filing of a petition by or against him. At the request of the Administrative Office of the U. S. Courts this Section was amended in May, 1963, to give the Bankruptcy Court authority, *on its own motion*, to examine into fees paid to attorneys in a bankruptcy proceeding. The Senate Report on the bill, set forth in U. S. Code Congressional and Administrative News, issue of June 5, 1963, No. 6, page 677 et seq., quotes the House Report thereon which pointed out that the language contained in the said Section prior to the proposed amendment did not adequately protect the credi-

tors and the bankrupt from excessive attorney's fees, inasmuch as lawyers were "frequently reluctant to challenge the fairness of the fees charged by their colleagues." It went on to say that "The bill strengthens the power of the court to review the reasonableness of attorneys' fees in bankruptcy cases."

In my opinion the amendment gave the Court the right, *at any time*, to examine the fees paid by a debtor to his attorney. I have been unable to find any authority to support the debtor's attorneys' contention that the *Court* is bound by the two year statute of limitations set forth in Section 11(e) of the Bankruptcy Act (Section 29(e) of Title 11, U. S. C.) That Section *so* limits a "*Receiver or Trustee*", as the Referee correctly found, but it does *not* preclude the *Referee* from examining the fee and directing the turnover of any excess to the Trustee.

I come now to the second point urged by the debtor's attorneys, namely, that the reduction of their fees from $2,550 to $750.00 was clearly erroneous. There is no question but that the debtor's attorneys enjoy a reputation as experts in the field of bankruptcy law, and that, as the Referee stated, they rendered "considerable intelligent services." However, the Referee further pointed out that there is now the sum of $12,705.39 in the hands of the Trustee, which is subject to obligations aggregating $8,465.67, incurred while the debtor was operating the business under Chapter XI, so that the net estate for the payment of allowances and distribution is $4,239.72. The Referee properly took the size of the estate into account in fixing the fee at $750.00. He correctly stated that "In determining the reasonable value of services rendered by an attorney the following elements are to be considered: the time spent, the intricacy of the problems involved, the size of the

estate, the opposition met, the results achieved,—all subject to the economical spirit of the Bankruptcy Act. As a rule, professional services, however able or prolonged, which yield no results, command no high rewards."

He cited the case of Rosenberg *v.* United States, 242 F. 2d 141, for the proposition that "The size of the estate and the amount available for general creditors must be considered in determining allowances. This may lead to a reduced scale where the estate is small, despite the attorney's diligent efforts for the estate."

In that case the Court of Appeals for this Circuit, in sustaining a reduction in the allowances paid to the attorney and the accountant for the Trustee, made the following comment: "Even though these professional services were well performed and helpful, we think the only realistic course in bankruptcy collections is that allowances must be limited —as they are by customary practice—to a reasonable percentage of the recovery. In view of the substantial proportion of the recovery here granted, we cannot say that Judge Murphy's reasoned conclusion requiring some reduction constitutes error as a matter of law."

The petition for review is denied.

Settle order on notice.

Læo F. Rayfiel
United States District Judge

Dated: October 30, 1963.

Referee's Decision and Order, Dated September 10, 1963

[SAME TITLE]

The trustee made application under Section 60d of the Bankruptcy Act for a re-examination into the fees paid to Levin & Weintraub, attorneys for the debtor herein.

Under Section 60d of the Bankruptcy Act as amended May 8, 1963, authority was given the court on its own motion in addition to the right, previously existing, of a trustee or any creditor to examine into the reasonableness of the fee paid to attorney for bankrupt. The Referee also on his own motion dated August 23, 1963, directed a hearing for the purpose of examining into the fees paid to Levin & Weintraub, attorneys for the debtor.

Both of the aforesaid proceedings came on to be heard on the 3rd day of September, 1963, at which time the respondents appeared *pro se* and filed an answer which denied that the fees paid to them were unreasonable and set up the affirmative defense that the proceeding had been instituted more than two (2) years since the filing of the petition under Chapter XI of the Bankruptcy Act and therefore was barred by the Statute of Limitations applicable thereto and, as an additional defense, a statement of the services rendered was set forth in order to show that the fee in the sum of $2600.00 less $50.00 disbursements is fair and reasonable. The matter was submitted without the taking of testimony except as to the facts which are set forth below as to filing dates and the financial status of the estate.

Referee's Decision and Order, Dated September 10, 1963

The respondent sets forth the affirmative defense that more than two years have gone by since the filing of the petition herein under Chapter XI and this proceeding is therefore barred by the running of the Statute of Limitations.

Section 11e of the Bankruptcy Act states that, "A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State Law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitations fixed by Federal or State Law has not expired at the time of the filing of the petition in Bankruptcy."

Under the provisions of Section 302 of the Bankruptcy Act, the date of adjudication in a petition filed under Chapter XI is fixed as of the date of the filing of the petition. In this matter, the petition having been filed on January 20, 1961, that date must be taken as the date of adjudication and the present application was therefore brought more than two years after the filing of the petition and adjudication herein.

The only precedent which I can find are the two unreported decisions of Hon. Robert P. Stephenson, Referee in Bankruptcy in the Southern District of New York, in the Matter of Valor Handbags, Inc., No. 88,450 and in the Matter of Littman's 34th Street Co., No. 89,496 in which he denied applications instituted more than two (2) years after adjudication by trustees for re-examination of fees paid to the attorneys for the respective bankrupts upon the ground that the right to re-examine a fee paid to an attorney for a bankrupt is derived from the Bankruptcy Act. The right to institute such a proceeding would not accrue unless bankruptcy ensued. In this connection the Supreme Court

in Holmberg *v.* Armbrecht, 327 U. S. 392, 66 S. Ct. 582, 90 L. Ed. 743, stated:

> "If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end to the matter. The Congressional Statute of Limitations is definitive."

If the proceeding instituted by the trustee be barred by the two year Statute of Limitations, is the Court likewise barred by the same statute? The answer to this question must be in the negative. The statute cannot be expanded to include the court as one of the persons intended by Section 11e of the Bankruptcy Act required to institute proceedings within the two year limit. If the Congress had so intended it would have also amended Section 11e to include the Court. I therefore find that as to the Court the limitation of two years does not apply. I do not pass upon the application of the trustee.

Section 60d of the Bankruptcy Act provides the bankruptcy court with the power to re-examine attorneys' fees paid by the bankrupt or debtor in contemplation of the filing of a petition by or against him. Regarding this section, it was said in Shor *v.* McGregor, (C. C. A. 5th 1939) 208 F. (2d) 421, that "the summary jurisdiction of the Court is too well established to be questioned." The term "reasonable" in its application to allowances must be determined on the basis of benefit to the estate. Warren *v.* Palmer, (C. C. A. 2d, 1942) 132 F. (2d) 665.

In determining the reasonable value of services rendered by an attorney the following elements are to be considered: the time spent, the intricacy of the problems involved, the size of the estate, the opposition met, the results achieved,—all subject to the economical spirit of the Bankruptcy Act.

As a rule, professional services, however able or prolonged, which yield no results, command no high rewards.

The size of the estate and the amount available for general creditors must be considered in determining allowances. This may lead to a reduced scale where the estate is small, despite the attorney's diligent efforts for the estate. Rosenberg *v.* United States, (C. C. A. 2d 1957) 242 F. (2d) 142.

The debtor filed a petition for arrangement under Chapter XI of the Bankruptcy Act on January 20, 1961. On April 20, 1961 it was adjudicated bankrupt.

The trustee sold the assets of the estate for the sum of $19,074.16. Out of said sum there was paid to the Security National Bank, the holder of a chattel mortgage on the machinery and equipment, the sum of $9,132.06. Additional estate expenses and charges were paid by the trustee leaving a balance on hand in the sum of $12,705.39.

During the three months the debtor operated the business as debtor-in-possession it incurred (but did not pay) debts in the sum of $7,465.67. In addition thereto, following the adjudication and during liquidation of the estate, there was incurred by the trustee a debt for use and occupation in the sum of $1,000.00; so that unpaid estate obligations total $8,465.67. Upon the payment of these obligations, the sum of $4,239.72 will remain for the payment of allowances to the trustee, his attorneys, accountants and appraiser, which applications amount to the aggregate sum of $5,555.03. Even if these applications be scaled down by the Referee, the amount available for distribution to creditors who were such at the time of the filing of the petition herein would be exceedingly small. The priority claims in the sum of $50,972.43 would certainly exhaust this so-called surplus leaving no moneys remaining to be paid to the general creditors.

Referee's Decision and Order, Dated September 10, 1963

Coming to the amount of fee paid to the attorneys for the debtor in the sum of $2,600.00, the answer recites the services rendered, and it would serve no purpose to set them forth at length herein. There is no doubt that considerable intelligent services were rendered by them but in view of the size of the estate and the fact that some distribution, if possible, should be paid to creditors, inasmuch as these proceedings were promulgated for their benefit, I must fix the reasonable value of the services rendered by the attorneys for the debtor at the sum of $750.00 and allow their disbursements in the sum of $50.00 for filing of the petition, making a total of $800.00. They are herewith directed to turn over to the trustee herein the sum of $1,800.00.

It is so ordered.

Dated, Mineola, New York
September 10, 1963

WILLIAM J. RUDIN,
Referee in Bankruptcy.